UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. 467 90 3898
Issued to: Ronald Scott MANLEY

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2388

Ronald Scott MANLEY

This appeal has been taken in accordance with 46 USC 239(g) and 46 CFR 5.30-1.

By order dated 30 December 1982, an Administrative Law Judge of the United States Coast Guard at Houston, Texas revoked Appellant's seaman's document upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that being the holder of the document above captioned, on or about 5 June 1981, Appellant was convicted of possession of marijuana by the County Court of Harris County, Texas.

The hearing was held at Houston, Texas on 12 November 1982.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the record of Appellant's conviction on 5 June 1981.

In defense, Appellant made several motions related to the admissibility of the court records, the legal effect of the Texas conviction, and the legal adequacy of the Coast Guard proceeding.

After the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved.

The Decision and Order was served on 6 January 1983. Appeal was timely filed on 4 February 1983 and perfected on 20 May 1983.

In Appeal Decision 2348 of 12 January 1984 I determined that the record in this case was insufficient to support the order of revocation and remanded the case to the Administrative Law Judge for further proceedings. As directed, the Administrative Law Judge held further proceedings on 23 May 1984.

FINDINGS OF FACT

On 5 June 1981, Appellant was the holder of the captioned document and was convicted for the possession of less than two ounces of marijuana by the County Criminal Court of Harris County, Texas and was find $100.

The conviction resulted from events on 31 May 1981. Appellant was arrested for Public intoxication at Spencer Lounge in South Houston, Texas. He was taken to police headquarters, told to empty his pockets and then searched. A green leafy substance wrapped in paper was found in the top left pocket of a pullover shirt that he was wearing. Appellant was subsequently charged with possession of marijuana in a quantity of less than two ounces. On 5 June 1981 he pleaded guilty and was fined $100.

Sometime after August 1982, the Investigating Officer who charged Appellant received copies of the official logbook of the SS LESLIE LYKES from the Senior Investigating Officer at MSO New Orleans. The log contained an entry stating that Appellant had possessed and used something believed to be marijuana aboard the vessel on 20 June 1982. After considering the logistical problems and expense of bringing the witnesses and evidence needed to prove the offense listed in the logbook to Houston, the Investigating Officer decided not to proceed with this offense. Instead he made a check with the local authorities. This revealed the conviction which became the subject of these proceedings.

In explaining why charges were brought against Appellant, the Investigating Officer stated "If it wasn't for this log entry, no charges would have been brought against Mr. Manley." In addition, the Senior Investigating Officer testified that Appellant's father had stated to him that son was a user of marijuana. Appellant's father, however, did not testify at the hearing.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges the following:

1. The Administrative Law Judge erred in amending the specification following receipt of the evidence to allege a conviction on 5 June 1981 rather than 5 June 1982.

2. The record of the court conviction shows, on its face, that it is not valid under state law.

3. The Conviction under Texas law does not establish a narcotic conviction under 46 U.S.C. 239a and 239b.

4. The hearing procedure improperly denies the Administrative Law Judge discretion in fixing the sanction and unreasonably places all discretion in the judgment of the Investigating Officer.

5. The record of conviction does not sufficiently identify Appellant as the individual convicted.

6. The circumstances of the offense charge do not justify revoking Appellant's merchant mariner's document.

7. Appellant's merchant mariner's document should not be revoked based on the uncharged and unsubstantiated events described in the logbook entry of 20 June 1982 and the oral statement made by Appellant's father to the Investigating Officer.

APPEARANCE: Stephen David Dix, Esq. of Schimmel and Dix, 8300 Bissonnet, Suite 170, Houston, Texas

OPINION

I

Appellant asserts that the Administrative Law Judge erred in amending the specification to allege a conviction on 5 June 1981 rather than 5 June 1982. I do not agree.

Appellant argues that the amendment was allowed following his plea and presentation of the record of the 1981 conviction. He complains that he never arraigned on the amended charge.

The amendment complained of in this case corrected a typographical error. Appellant in his brief does not claim he was surprised or unable to defend because of the amendment. He did not request a continuance to prepare a better defense to the changed date. On appeal he cites no authority which requires that he be again arraigned on, or plead anew to, the amended specification.

Under the doctrines set forth in Kuhn v. C.A.B. 183 F.2d 839 (D.C. Cir. 1950), the correction of such errors is permissible and does not require reversal. See 46 CFR 5.20-65, Appeal Decisions 2332 (LORENZO), 2209 (SIEGELMAN), and 2152 (MAGIE). I find no error requiring reversal in the actions of the Administrative Law Judge.

II

Appellant argues that the record of conviction in state court shows, on its face, that it is not valid under state law. This is

not a basis for granting relief.

Appellant argues that under state court decisions the record of conviction is not valid because it fails to show that he properly waived a jury trial. Because of this, he asserts that even state administrative agencies would not recognized the conviction.

These suspension and revocation proceedings are not the proper forum for a collateral attack on a state conviction. See Appeal Decisions 2201 (BROADNAX) and 2120 (McLAUGHLIN). The record of the conviction introduced by the Investigating Officer purports to show a state conviction and contains the court seal. Appellant has provided nothing to show that it has been vacated, reversed, or otherwise declared invalid by a court with authority to do so. Therefore, I will not inquire into the validity of the state conviction.

Should the state conviction indeed by invalid, Appellant may seek to have it reversed, vacated, or otherwise set aside by a court with authority to do so. The order of the Administrative Law Judge could then be rescinded under 46 CFR 5.03-10.

III

Appellant asserts that the conviction under Texas law does not amount to a conviction under 46 U.S.C. 239a and 239b. I do not agree.

Appellant argues that the definition of marijuana under Texas law is different than the definition under 46 U.S.C. 239a. In support of his argument Appellant cites Appeal Decision 1984 (RUIZ) for the proposition that the Investigating Office must "...prove that the substance upon which the state charge is based falls within the federal definition..."

Appellant's argument is not persuasive. It is true that RUIZ reversed a finding based on a Texas conviction for a marijuana offense because of the difference in the state and federal definitions. However, RUIZ had claimed that the material he possessed fell within a specific exception to the definition of marijuana. Here Appellant offered no evidence regarding the nature of the substance he was convicted of possessing.

Appellant further urges that under Texas law possession of marijuana is a relatively minor offense but federal law contemplates a more serious offense. This argument is misplaced. 46 U.S.C. 239a and 239b do not distinguish between convictions for felonies and misdemeanors or between convictions for offense that

are or are not serious. They refer merely to convictions.

As discussed above, the fact that Appellant was convicted for possession of marijuana is sufficient to sustain the finding of the Administrative Law Judge. See Appeal Decision 2303 (HODGMAN).

IV

Appellant urges that the regulations improperly deny the Administrative Law Judge discretion in fixing the sanction in cases involving narcotic drug law convictions. I do not agree.

This is an issue which I addressed in detail in Appeal Decision 2303 (HODGMAN) aff'd NTSB Order EM 103 of 16 December 1983. There is no need to repeat that analysis here.

V

Appellant asserts that the record of conviction does not sufficiently identify him as the individual involved. I do not agree.

The record of the state court conviction identifies Appellant only by name. Appellant, in his brief, cites no evidence in the record indicating that the court record does not refer to him.

In support of his position, Appellant cites two state cases: Francisco v. Board of Dental Examiners, 149 S.W. 2d 619, (Tx. Civ. App. - Austin 1941); and Gentry v. Texas Department of Public Safety, 379 S.W. 2d 114 (Tx. Civ. App. - Houston 1964). Although Texas courts might not permit revocation of a state license based on the limited information in this court record, I am not convinced that the Coast Guard must reach the same result. Appellant cites no federal court decisions or other authority requiring federal agencies to have more identifying information than is present here.

Whether or not the court record pertained to Appellant is a question of fact to be resolved by the Administrative Law Judge. Only when the finding of the Administrative Law Judge is unreasonable based on the evidence, will I disturb it. Appeal Decisions 2333 (AYALA) and 2302 (FRAPPIER).

The Administrative Law Judge's finding that Appellant was the person convicted is not unreasonable under the circumstances of this case. This is not to say that more evidence is not desirable. It, of course, is and may be required in some cases, especially where there is evidence tending to show that a respondent and the person named in the conviction are not the same.

IV

Appellant urges that the circumstances surrounding his offense do not justify revocation. I agree.

As originally received by the Commandant, the record in this case showed only that Appellant had been convicted of a relatively minor marijuana offense over one year prior to the date on which he was charged. In Appeal Decision 2348, my earlier decision in this case, I stated that this was insufficient to affirm the order of the Administrative Law Judge under Coast Guard policy as set forth in the Marine Safety Manual, COMDTINST M16000.3 and earlier appeal decisions.

The evidence presented on remand with respect to the conviction which was the subject of this hearing did not show it to be more serious than the bare record of the conviction itself. Instead, it merely confirmed that the conviction involved possession of only a very small amount of marijuana over one year earlier while not acting under authority of a mariner's document. In addition, the Investigating Officer stated on the record that had it not been for a log entry concerning another possible offense, Appellant would not have been charged. Thus, the additional information concerning the conviction obtained on remand still does not justify affirming the Order of the Administrative Law Judge.

VII

Appellant asserts that the Order cannot be upheld on the basis of the information concerning additional offenses presented by the Investigating Officer. I agree.

Appellant was suspected of possession and use of marijuana while serving aboard ship based on a logbook entry. He was also suspected of being a user of marijuana based on the statements which the Senior Investigating Officer testified that Appellant's father made to him during the course of the Investigation.

Under the Administrative Procedure Act in 5 USC 554 (b) (3), notice of a hearing must contain "the matters of fact and law asserted." 46 CFR 5.05-17 (b) requires that a specification state: "(2) Date and place of offense; and (3) A statement of the facts constituting the offense."

The specification on which the hearing proceeded alleged only a conviction for possession of marijuana. It did not give notice that Appellant's document was to be in jeopardy for possession of marijuana aboard ship or for being a user of marijuana. Thus, the

requirements for proceeding against Appellant's document based on these offenses under either the Administrative Procedure Act or the Coast Guard's own regulations have not been met.

For these reasons, the additional offenses, of which Appellant is suspected, do not provide a basis to affirm the order of the Administrative Law Judge.

VIII

The question remains as to what the proper disposition of this case is. The charge and specification have been proved but the circumstances do not justify revocation.

The Investigating Officer initially has discretion to bring charges or not in accordance with current Coast Guard policy. Appeal Decision 2303 (HODGMAN). I have the power and duty to supervise these proceedings to ensure that the Investigating Officer exercises his discretion properly with Coast Guard policy. Appeal Decisions 2377 (HICKEY), 2348 (MANLEY) and 2168 (COOPER). Under 46 U.S.C. 239b, I had the additional discretion, which no longer exists under 46 U.S.C. 7704, to revoke a mariner's document or not once conviction for a narcotic drug law violation has been proved. HODGMAN and HICKEY supra. I have occasionally exercised this discretion to vacate the Order of the Administrative Law Judge without disturbing the findings. See Appeal Decisions 1513 (ERDAIDE), 1514 (BANKS), 1594 (RODRIGUEZ), 2036 (SCHMIDT) and 2095 (SCOTT).

This is an appropriate case to vacate the Order of the Administrative Law Judge but affirm the findings. Since this case was brought under 46 U.S.C. 239b, I may do so. This will allow Appellant's merchant mariner's record to reflect his conviction, should it be relevant in a future action, without revocation of his document for the conviction charged here.

CONCLUSION

The circumstances of the offenses proved do not justify revocation of Appellant's merchant mariner's document. The additional offenses of which Appellant is suspected were not properly charged and proved. They, therefore, do not provide a basis to support revocation of his document.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas on 30 December 1982 is VACATED. The findings are AFFIRMED.

J. S. GRACEY
Admiral, U.S. Coast Guard
Commandant

Signed this 24th day of April 1985.